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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

<p>FRANCIS KELLY, DENNIS KRUGER, ROBERT P. ANDERSON, GEORGE O. BULLWINKEL, STEPHEN C. CHRISTENSEN, FRED J. FEGAN, GERALD L. GREY, THOMAS E. KAZARIAN, FRANK M. KUNST, GARY J. LAVAYSSE, PATRICK H. McLAUGHLIN, DANIEL M. O'DONNELL, ROBERT G. OLLER, HENRY L. RANEY, GEORGE J. RIPOLL, PATRICIA CAULFIELD AND HORTENCE PUCETTI, Individually and on Behalf of Others Similarly Situated,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>CITY AND COUNTY OF SAN FRANCISCO; SAN FRANCISCO FIRE DEPARTMENT; EDWARD M. HARRINGTON, in his Official Capacity as Controller of the City and County of San Francisco; PHILIP A. GINSBURG in his Official Capacity as Human Resources Director of the City and County of San Francisco; and DOES ONE through FIFTY, inclusive,</p> <p style="text-align: center;">Defendants.</p>	<p>) Case No. C 05-1287 EMC))) FIRST AMENDED COMPLAINT) FOR UNPAID OVERTIME) COMPENSATION, VACATION,) AND VESTED SICK LEAVE,) LIQUIDATED DAMAGES,) INJUNCTIVE RELIEF,) DECLARATORY RELIEF,) ATTORNEYS' FEES AND COSTS;) AND) PETITION FOR WRIT OF) MANDATE UNDER CAL. CODE) CIV. PROC. § 1085) (29 U.S.C. §§207, 216; Cal. Lab. Code) §227.3; San Francisco Civil Service) Commission Rule 320.16)) AND) DEMAND FOR JURY TRIAL</p> <hr/> <p>) CLASS ACTION (Fed. R. Civ. P. 23))) COLLECTIVE ACTION) (29 U.S.C. § 216(b))</p>
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Plaintiffs complain and allege as follows:

I. INTRODUCTION

1. This action is brought concurrently as both a class action and a collective action to recover unpaid overtime compensation, unpaid vacation, unpaid vested sick leave, and liquidated

1 damages owed to Plaintiffs and all other individuals formerly employed by the San Francisco Fire
2 Department (“SFFD”) who obtained deficient lump sum payments upon separation from employment.

3 2. For at least three years prior to the filing of this complaint and continuing to this day
4 (“Liability Period”), when uniformed employees of the SFFD were paid for overtime work, for
5 vacation time or for sick time, monies for Training and Education Achievement Pay, Retention Pay
6 and/or Terrorism Response Training Pay, as applicable, were included in their wage rate. When an
7 employee separates from employment with the City and County of San Francisco (“City”), the City
8 makes a lump sum payment to the former employee for any unused compensatory time off in lieu of
9 overtime, vacation time, and vested sick leave. During the Liability Period, the City has had a
10 consistent policy of shortchanging the separating firefighters by failing to include Training and
11 Education Achievement Pay, Retention Pay and Terrorism Response Training Pay in the lump sum
12 payment.

13 3. This action is a collective action under the Fair Labor Standards Act of 1938 (“FLSA”)
14 [29 U.S.C. § 201 et seq.]. Under the FLSA [29 U.S.C. § 207(o)], the City is required to pay for
15 accrued compensatory time off in lieu of overtime at the regular rate. Plaintiffs seek to recover unpaid
16 overtime compensation, liquidated damages, interest, reasonable attorneys’ fees, and litigation costs
17 on behalf of themselves and all similarly situated former San Francisco firefighters who may opt in
18 pursuant to the FLSA [29 U.S.C. § 216(b)] (“Collective Action Members”). Plaintiffs will request
19 the Court to authorize notice to all such persons informing them of the pendency of this action and
20 their right to opt into this lawsuit pursuant to the FLSA [29 U.S.C. § 216(b)].

21 4. This action is also a class action under Rule 23 of the Federal Rules of Civil Procedure,
22 brought on behalf of Plaintiffs and all others similarly situated who separated from employment with
23 the SFFD at any time during the Liability Period and who received deficient lump sum payments
24 (“Class Members”). Plaintiffs will request that the Court provide notice of this class action regarding
25 unpaid vacation pay and unpaid vested sick leave. By the class action, Class Members are petitioning
26 for a writ of mandate under California Code of Civil Procedure § 1085 to order Defendants to pay
27 unpaid vacation pay under California Labor Code § 227.3 and unpaid vested sick leave under San
28 Francisco Civil Service Commission Rule 320.16. Under California Labor Code § 227.3, the City is

1 required to pay for unused vacation time at the final rate of pay. Under San Francisco Civil Service
 2 Commission Rule 320.16, the City is required to reimburse unused vested sick leave at the base rate
 3 of pay. Plaintiffs request a writ of mandate to compel Defendants to discharge their mandatory and
 4 ministerial duties to comply with Labor Code §227.3 and San Francisco Civil Service Commission
 5 Rule 320.16, as well as injunctive and declaratory relief.

6 5. Pursuant to California Code of Civil Procedure § 1063, the parties in this mixed civil
 7 and special proceeding will be referred to as “Plaintiffs” and “Defendants.”

8 **II. JURISDICTION**

9 6. This Court has jurisdiction over Plaintiffs’ and Collective Action Members’ claim for
 10 unpaid overtime compensation, liquidated damages, and attorneys’ fees and costs pursuant to the
 11 FLSA [29 U.S.C. §§ 207, 216(b)].

12 7. This Court has supplemental jurisdiction over Plaintiffs’ and Class Members’ petition
 13 for writ of mandate, pursuant to Code of Civil Procedure § 1085, to compel Defendants to comply
 14 with their ministerial duty to pay unpaid vacation pay as required by California Labor Code § 227.3
 15 and to pay unpaid vested sick leave as required by San Francisco Civil Service Commission Rule
 16 320.16. This Court has supplemental jurisdiction over Plaintiffs’ state law claims pursuant to
 17 28 U.S.C. § 1367(a) because the state law claims are so related to the federal claims that they form
 18 part of the same case or controversy between Plaintiffs and Defendants.

19 **III. VENUE**

20 9. Venue is proper in the Northern District of California under 28 U.S.C. § 1391(b)
 21 because the events or omissions giving rise to the claims occurred in this District.

22 **IV. PARTIES**

23 **A. PLAINTIFFS**

24 10. Plaintiff Francis Kelly is a resident of San Francisco, California. Plaintiff Kelly was
 25 employed as a uniformed member of the SFFD for approximately more than thirty-one (31) years.
 26 Plaintiff Kelly retired from the SFFD on or about March 31, 2002. After his retirement from City
 27 employment, on or about May 21, 2002, Plaintiff Kelly received lump sum payments purporting to
 28 be for accrued vacation and vested sick leave. Plaintiff Kelly brings this complaint and petition for

1 writ of mandate on his own behalf and on behalf of all others similarly situated, pursuant to 29 U.S.C.
2 § 216(b), California Code of Civil Procedure § 1085, and Federal Rule of Civil Procedure 23.

3 11. Plaintiff Dennis Kruger is a resident of San Mateo, California. Plaintiff Kruger was
4 employed as a uniformed member of the SFFD for more than thirty (30) years. Plaintiff Kruger retired
5 from the SFFD on or about July 10, 2004. After his retirement from City employment, on or about
6 November 19, 2004, Plaintiff Kruger received lump sum payments purporting to be for accrued
7 compensatory time in lieu of overtime, accrued vacation, and vested sick leave. Plaintiff Kruger
8 brings this complaint and petition for writ of mandate on his own behalf and on behalf of all others
9 similarly situated, pursuant to 29 U.S.C. § 216(b), California Code of Civil Procedure § 1085, and
10 Federal Rule of Civil Procedure 23.

11 12. Plaintiff Robert P. Anderson is a resident of San Francisco, California. Plaintiff
12 George O. Bullwinkel is a resident of Hollister, California. Plaintiff Stephen C. Christensen is a
13 resident of Windsor, California. Plaintiff Fred J. Fegan is a resident of Sonoma, California. Plaintiff
14 Gerald L. Grey is a resident of Redwood City, California. Plaintiff Thomas E. Kazarian is a resident
15 of Montara, California. Plaintiff Frank M. Kunst is a resident of Vacaville, California. Plaintiff Gary
16 J. Lavaysse is a resident of Sonoma, California. Plaintiff Patrick H. McLaughlin a resident of Pleasant
17 Hill, California. Plaintiff Daniel M. O'Donnell is a resident of Santa Rosa, California. Plaintiff
18 Robert G. Oller is a resident of Sonoma, California. Plaintiff Henry L. Raney is a resident of Concord,
19 California. Plaintiff George J. Ripoll is a resident of Sebastopol, California.

20 13. Plaintiffs Anderson, Bullwinkel, Christensen, Fegan, Grey, Kazarian, Kunst, Lavaysse,
21 McLaughlin, O'Donnell, Oller, Raney, and Ripoll were each employed as a uniformed member of the
22 San Francisco Fire Department until his separation from City employment in 2002. Thereafter, each
23 such Plaintiff received a lump sum payment purporting to be for accrued compensatory time in lieu
24 of overtime, accrued vacation and/or vested sick leave.

25 14. Plaintiff Patricia Caulfield is a resident of San Francisco, California. Plaintiff Caulfield
26 is the widow of, and successor in interest to, Garet J. Caulfield who was employed as a uniformed
27 member of the San Francisco Fire Department until his separation from City employment in 2002.
28 Thereafter, Plaintiff Caulfield received a lump sum payment purporting to be for accrued

1 compensatory time in lieu of overtime, accrued vacation and/or vested sick leave earned by Gare J.
2 Caulfield.

3 15. Plaintiff Hortence Puccetti is a resident of San Francisco, California. Plaintiff Puccetti
4 is the widow of, and successor in interest to, Frank Puccetti who was employed as a uniformed
5 member of the San Francisco Fire Department until his separation from City employment in 2002.
6 Thereafter, Plaintiff Puccetti received a lump sum payment purporting to be for accrued compensatory
7 time in lieu of overtime, accrued vacation and/or vested sick leave earned by Frank Puccetti.

8 16. At all times material herein, Plaintiffs, Class Members and Collective Action Members
9 were employees of the SFFD, individuals who had separated from such employment, or successors
10 in interest to said employees or individuals.

11 **B. DEFENDANTS**

12 17. Defendant City and County of San Francisco is, and at all times material herein was,
13 a city and county, duly organized and existing under the laws and Constitution of the State of
14 California and the Charter of the City and County of San Francisco ("Charter").

15 18. Defendant San Francisco Fire Department is, and at all times material herein was, an
16 agency of the City and County of San Francisco.

17 19. Defendant Edward M. Harrington, in his official capacity as Controller of the City and
18 County of San Francisco, authorizes the disbursement of all funds, including payroll, for the City and
19 County of San Francisco pursuant to Charter section 3.105.

20 20. Defendant Philip A. Ginsburg, in his official capacity as Human Resources Director
21 of the City and County of San Francisco, administers personnel and payroll services for the City
22 employees, pursuant to Charter sections 10.102 and 10.103.

23 21. The true names and capacities, whether individual, corporate, associate, or otherwise,
24 of Defendants sued herein as DOES One through Fifty, inclusive, are currently unknown to Plaintiffs,
25 who therefore sue Defendants by such fictitious names under Code of Civil Procedure § 474.
26 Plaintiffs are informed and believe, and based thereon allege, that each of the Defendants designated
27 herein as a DOE is legally responsible in some manner for the unlawful acts alleged herein. Plaintiffs
28 will seek leave of court to amend this Complaint to reflect the true names and capacities of the

1 Defendants designated hereinafter as DOES when such identities become known.

2 **V. FACTUAL ALLEGATIONS**

3 22. At all times material herein, San Francisco Firefighters Union Local 798, IAFF, AFL-
4 CIO ("Local 798") has been the sole and exclusive collective bargaining agent and the recognized
5 employee organization within the meaning of California Government Code § 3501(b) for two units
6 of uniformed employees in the SFFD.

7 23. At all times material herein, the City and Local 798 were parties to a Memorandum of
8 Understanding that set forth wages, hours and working conditions.

9 24. At all times material herein, the Memorandum of Understanding provided that the
10 Defendants were to pay Training and Education Achievement Pay to members with an Associate of
11 Arts or Associate of Science degree in Fire Science or a related field, a Bachelor of Arts or Bachelor
12 of Science degree in a related field, or ten (10) years of service in the Fire Department and completion
13 of the Fire Department's annual training requirements. At all times material herein, the Memorandum
14 of Understanding stated that the Training and Education Achievement Pay is "part of an employee's
15 regular rate of pay for the purpose of computing overtime pay." At all times material herein through
16 June 30, 2004, the Memorandum of Understanding also stated that the Training and Education
17 Achievement Pay is "part of an employee's salary for the purpose of computing retirement benefits
18 and retirement contributions." Effective July 1, 2004, the Memorandum of Understanding also stated
19 that it was the parties' understanding that the Training and Education Achievement Pay is "part of the
20 salary attached to the rank" for all qualified uniformed members.

21 25. At all times material herein beginning on July 1, 2002, the Memorandum of
22 Understanding provided that the Defendants were to pay Retention Pay to employees who had
23 completed at least twenty-seven (27) years of service in the SFFD (or at least twenty-five (25) years
24 of service as of July 1, 2003 or at least twenty-three (23) years of service as of July 1, 2004). At all
25 times material herein, the Memorandum of Understanding stated that it was the parties' understanding
26 that Retention Pay is "part of the salary attached to ranks" for employees who had completed the
27 requisite years of service. At all times material herein, the Memorandum of Understanding also stated
28 that "Retention Pay shall be included for purposes of retirement benefit calculations and

1 contributions.” Effective July 1, 2004, the Memorandum of Understanding also stated that Retention
2 Pay is “part of an employee’s regular rate of pay for the purpose of computing overtime pay.”

3 26. At all times material herein beginning on July 1, 2004, the Memorandum of
4 Understanding provided that the Defendants were to pay Terrorism Response Training Pay to all
5 employees. The Memorandum of Understanding provided that the Terrorism Response Training Pay
6 is “part of an employee’s regular rate of pay for the purpose of computing overtime pay.” The
7 Memorandum of Understanding also stated that it was the parties’ understanding that the Terrorism
8 Response Training Pay is “part of the salary attached to all ranks and shall be included for the
9 purposes of retirement benefit calculations and contributions.”

10 27. Prior to their separation from employment, Plaintiffs and Collective Action Members
11 who received, as part of their wages, Training and Education Achievement Pay, Retention Pay and
12 Terrorism Response Training Pay for regular hours worked, also received Training and Education
13 Achievement Pay, Retention Pay and Terrorism Response Training Pay when they performed overtime
14 work and received monetary compensation.

15 28. Prior to their separation from employment, Plaintiffs and Class Members who received,
16 as part of their wages, Training and Education Achievement Pay, Retention Pay and Terrorism
17 Response Training Pay for regular hours worked, also received Training and Education Achievement
18 Pay, Retention Pay and Terrorism Response Training Pay when they took paid vacation time off.

19 29. Prior to their separation from employment, Plaintiffs and Class Members who received,
20 as part of their wages, Training and Education Achievement Pay, Retention Pay and Terrorism
21 Response Training Pay for regular hours worked, also received Training and Education Achievement
22 Pay, Retention Pay and Terrorism Response Training Pay when they took paid sick leave.

23 30. Upon separation from employment, Plaintiffs and Collective Action Members received
24 payments purporting to be for accrued compensatory time off in lieu of overtime. None of these
25 payments included Training and Education Achievement Pay, Retention Pay or Terrorism Response
26 Training Pay.

27 31. Upon separation from employment, Plaintiffs and Class Members received payments
28 purporting to be for accrued vacation time. None of these payments included Training and Education

1 Achievement Pay, Retention Pay or Terrorism Response Training Pay.

2 32. Upon separation from employment, Plaintiffs and Class Members received payments
3 purporting to be for accrued vested sick leave. None of these payments included Training and
4 Education Achievement Pay, Retention Pay or Terrorism Response Training Pay.

5 33. The employment and work records for each Plaintiff, Collective Action Member and
6 Class Member are in the exclusive possession, custody and control of the Defendants. Therefore,
7 Plaintiffs are unable to state at this time the exact amounts owing to each Plaintiff, Collective Action
8 Member and Class Member. The FLSA [29 U.S.C. § 211(c)] requires the Defendants to maintain and
9 preserve payroll and other employment records with respect to each Plaintiff, Collective Action
10 Member and Class Member from which the exact amount of Defendants' liability may be ascertained.

11 VI. CLASS ACTION ALLEGATIONS

12 34. Plaintiffs bring this action as a class action, for violations of Labor Code § 227.3 and
13 San Francisco Civil Service Commission Rule 320.16, pursuant to Federal Rule of Civil Procedure
14 23, on behalf of themselves and all others similarly situated.

15 35. The Class that Plaintiffs seek to represent is composed of and defined as follows:

16 All former employees of the San Francisco Fire Department who were
17 eligible for Training and Education Achievement Pay, Retention Pay
18 and/or Terrorism Response Training Pay and who, following separation
19 from employment, received payment, after February 24, 2002, for
vacation time and/or vested sick leave that did not include Training and
Education Achievement Pay, Retention Pay and/or Terrorism Response
Training Pay.

20 36. This action has been brought and may properly be maintained as a class action under
21 Federal Rule of Civil Procedure 23 because there is a well-defined community of interest in the
22 litigation and the proposed class is easily ascertainable:

23 a. Membership in Class. Plaintiffs are members of the Class they seek to
24 represent.

25 b. Numerosity. The potential members of the Class, as defined, are so numerous
26 that joinder of all the members of the Class is impracticable. While the precise number of Class
27 Members has not been determined at this time, Plaintiffs are informed and believe, and based thereon
28 allege, that there are in excess of two hundred-fifty (250) persons in the Class.

1 c. Commonality. There are questions of law and fact common to the Plaintiffs
2 and the Class that predominate over any questions affecting only individual members of the Class.
3 These common questions of law and fact include without limitation:

4 (1) Whether Defendants violated Labor Code § 227.3 by failing to include
5 Training and Education Achievement Pay, Retention Pay and Terrorism Response Training Pay in
6 payments for accrued vacation time.

7 (2) Whether Defendants violated San Francisco Civil Service Commission
8 Rule 320.16 by failing to include Training and Education Achievement Pay, Retention Pay and
9 Terrorism Response Training Pay in payments for accrued vested sick leave.

10 Even though not every Class Member is eligible for Retention Pay and Terrorism Response
11 Training Pay, virtually every Class Member is eligible for Training and Education Achievement Pay.
12 Moreover, differences among Class Members as to their balances of accrued vacation time and vested
13 sick leave at the time of separation from employment relate only to the measure of damages for each
14 individual.

15 d. Typicality. The claims of the named Plaintiffs are typical of the claims of the
16 Class. Plaintiffs and all Class Members sustained similar injuries and damages arising out of and
17 caused by Defendants' common course of conduct in violation of the law.

18 e. Adequacy of Representation. The named Plaintiffs will fairly and adequately
19 represent and protect the interests of the Class Members. Counsel who represent the Plaintiffs are
20 competent and expert in litigating labor and employment actions affecting numerous employees, such
21 as union members.

22 f. Superiority of Class Action. A class action under Federal Rule of Civil
23 Procedure 23 is superior to other available means for the fair and efficient adjudication of this
24 controversy. Individual joinder of all Class Members is not practicable, and questions of law and fact
25 common to the Class predominate over any questions affecting only individual members. Each Class
26 Member has been damaged and is entitled to recovery by reason of Defendants' illegal policy and/or
27 practice of failing to include Training and Education Achievement Pay, Retention Pay and Terrorism
28 Response Training Pay in lump sum payments for accrued vacation time and accrued vested sick

1 leave, as required by law. Class action treatment will allow those similarly situated persons to litigate
2 their claims in the manner that is most efficient and economical for the parties and the judicial system.

3 **VII. COLLECTIVE ACTION ALLEGATIONS**

4 37. This action is maintainable as an “opt-in” collective action pursuant to 29 U.S.C.
5 § 216(b) as to claims for damages, liquidated damages and attorneys’ fees under the FLSA. Plaintiffs
6 bring this action on their own behalf and on behalf of others similarly situated. In addition to
7 Plaintiffs, numerous other former employees of the SFFD are similarly situated in that they have
8 received lump sum payments that improperly failed to include Training and Education Achievement
9 Pay, Retention Pay and/or Terrorism Response Training Pay.

10 38. The Collective Action Class that Plaintiffs seek to represent is composed of and
11 defined as follows:

12 All former employees of the San Francisco Fire Department who were
13 eligible for Training and Education Achievement Pay, Retention Pay
14 and/or Terrorism Response Training Pay and who, following separation
15 from employment, received payment, after February 24, 2002, for
compensatory time off in lieu of overtime that did not include Training
and Education Achievement Pay, Retention Pay and/or Terrorism
Response Training Pay, and who opt in to this action.

16 39. Plaintiffs are representative of those other former employees and act on behalf of their
17 interests as well as Plaintiffs’ own interests in bringing this action. Common questions of law and fact
18 exist as to whether Defendants (1) violated the FLSA; and (2) knowingly and willfully violated the
19 FLSA. These similarly situated former employees may be identified and located through Defendants’
20 records. These similarly situated former employees should be notified and allowed to opt in to this
21 action, pursuant to 29 U.S.C. § 216(b), for the purpose of adjudicating their claims for damages,
22 liquidated damages and attorneys’ fees under the FLSA.

23 **VIII. FIRST CAUSE OF ACTION** 24 **(VIOLATION OF FAIR LABOR STANDARDS ACT)**

25 40. Plaintiffs reallege and incorporate by reference each and every allegation contained
26 in paragraphs 1 through 39, inclusive, as though fully set forth herein.

27 41. At all times material herein, the Plaintiffs and Class Members have been entitled to the
28 rights, protections and benefits provided by the FLSA.

1 42. At all times material herein, Defendants were aware that the City and County of San
2 Francisco was subject to the FLSA.

3 43. At all times material herein, Defendants City and County of San Francisco and San
4 Francisco Fire Department have been an “employer” as defined in 29 U.S.C. § 203(d) and a “public
5 agency” as defined in 29 U.S.C. § 203(x).

6 44. At all times material herein, prior to their separations, Plaintiffs and Collective Action
7 Members were “employees” as defined in 29 U.S.C. § 203(e)(2)(C) and “employees in fire protection
8 activities” as defined in 29 U.S.C. § 203(y) or successors in interest to such employees.

9 45. Employees engaged in fire protection activities who are covered under the FLSA are
10 entitled to overtime compensation at a rate of not less than one and one-half times their regular rate
11 of pay for all hours worked in excess of the maximum hours set forth in 29 U.S.C. § 207(k).

12 46. Pursuant to 29 U.S.C. § 207(o), employees of a public agency may receive
13 compensatory time off in lieu of overtime compensation at a rate of not less than one and one-half
14 hours for each hour of overtime worked, if so provided in the applicable provisions of a memorandum
15 of understanding between the public agency and the representative of such employees.

16 47. At all times material herein, the Memorandum of Understanding in effect between the
17 City and Local 798 provided for compensatory time off in lieu of overtime compensation.

18 48. Pursuant to 29 U.S.C. § 207(o)(4), an employee of a public agency, who has accrued
19 compensatory time off, has the right, upon termination of employment, to be paid for the unused
20 compensatory time at a rate of compensation not less than the higher of (A) the average regular rate
21 received by such employee during the last three years of employment, or (B) the final regular rate
22 received by such employee.

23 49. Plaintiffs each received a lump sum payment purporting to be for accrued
24 compensatory time that remained unused at the time of separation from employment. However, this
25 lump sum payment for accrued compensatory time did not include Training and Education
26 Achievement Pay, Retention Pay or Terrorism Response Training Pay.

27 50. Because Training and Education Achievement Pay, Retention Pay and Terrorism
28 Response Training Pay are part of the regular rate of pay for purposes of computing overtime,

Defendants' failure to include Training and Education Achievement Pay, Retention Pay and Terrorism Response Training Pay in the payment for accrued unused compensatory time in lieu of overtime owed to each Plaintiff and Collective Action Member is a violation of 29 U.S.C. § 207(o).

51. As a result of the unlawful acts of Defendants, Plaintiffs and all persons similarly situated have been deprived of compensatory time in lieu of overtime in the amounts to be determined at trial, and are entitled to recovery of such amounts, liquidated damages, attorneys' fees and costs, pursuant to 29 U.S.C. § 216(b).

52. At all times material herein, Defendants knew that Training and Education Achievement Pay, Retention Pay and Terrorism Response Training Pay were part of the regular rate of pay for purposes of computing overtime. Notwithstanding such knowledge, Defendants repeatedly refused requests to include Training and Education Achievement Pay, Retention Pay and Terrorism Response Training Pay in payments for accrued unused compensatory time in lieu of overtime.

53. Accordingly, the violation of 29 U.S.C. § 207(o) arising out of Defendants' failure and refusal to include Training and Education Achievement Pay, Retention Pay and Terrorism Response Training Pay in payments for accrued unused compensatory time in lieu of overtime was willful, knowing, and showed reckless disregard for whether their conduct was prohibited by the Fair Labor Standards Act.

**IX. SECOND CAUSE OF ACTION
(WRIT OF MANDATE TO REMEDY VIOLATION OF CALIFORNIA LABOR CODE
§ 227.3 AND FOR DECLARATORY AND INJUNCTIVE RELIEF)**

54. Plaintiffs reallege and incorporate by reference each and every allegation contained in paragraphs 1 through 53, inclusive, as though fully set forth herein.

55. At all times material herein, the Plaintiffs and Class Members have been entitled to the rights, protections and benefits provided by California Labor Code § 227.3.

56. California Labor Code § 227.3 states that whenever an employer provides paid vacations and an employee is terminated without having taken his vested vacation time off, all vested vacation shall be paid to him as wages at his final rate.

57. It is Defendants' regular practice to include Training and Education Achievement Pay, Retention Pay and Terrorism Response Training Pay, as appropriate, in wages paid to active

1 employees of the SFFD who take vacation time off.

2 58. Plaintiffs and Class Members each received a lump sum payment purporting to be for
3 vested vacation time that remained unused at the time of separation from employment. However, this
4 payment for accrued unused vacation did not include Training and Education Achievement Pay,
5 Retention Pay or Terrorism Response Training Pay.

6 59. Because Training and Education Achievement Pay, Retention Pay and Terrorism
7 Response Training Pay are part of the employees' salary, Defendants' failure to include Training and
8 Education Achievement Pay, Retention Pay and Terrorism Response Training Pay in the payment for
9 accrued unused vacation time constitutes a violation of California Labor Code § 227.3.

10 60. Defendants have a mandatory and ministerial duty to comply with California Labor
11 Code § 227.3 by paying vested vacation time, at the final rate, to uniformed employees of the SFFD
12 who separate from employment.

13 61. Plaintiffs and Class Members will suffer an irreparable loss of wages if Defendants do
14 not properly calculate and pay the accrued unused vacation time.

15 62. Plaintiffs and Class Members have a clear, present and beneficial right to Defendants'
16 compliance with California Labor Code § 227.3.

17 63. Plaintiffs and Class Members have no other plain, speedy and adequate remedy in the
18 ordinary course of law other than the relief sought in this petition.

19 64. An actual controversy now exists between the Plaintiffs and Class Members, on the one
20 hand, and the Defendants, on the other, concerning their respective rights and duties. Plaintiffs
21 contend that California Labor Code §227.3 requires the Defendants to include Training and Education
22 Achievement Pay, Retention Pay and Terrorism Response Training Pay in all payments for accrued
23 unused vacation pay for all former employees who are eligible for such pay, while Defendants
24 disagree.

25 65. Plaintiffs and Class Members seek a judicial determination and declaration that
26 Defendants' refusal to include Training and Education Achievement Pay, Retention Pay and Terrorism
27 Response Training Pay in all payments for accrued unused vacation pay for all former employees who
28 are eligible for such pay violates Labor Code § 227.3.

**X. THIRD CAUSE OF ACTION
(WRIT OF MANDATE TO REMEDY VIOLATION OF SAN FRANCISCO CIVIL
SERVICE RULE 320.16 AND FOR DECLARATORY AND INJUNCTIVE RELIEF)**

66. Plaintiffs reallege and incorporate by reference each and every allegation contained in paragraphs 1 through 65, inclusive, as though fully set forth herein.

67. At all times material herein, Plaintiffs and Class Members have been entitled to the rights, protections and benefits provided by San Francisco Civil Service Commission Rule (“CSC Rule”) 320.16.

68. San Francisco Civil Service Commission Rule 320.16 provides that an employee, who has accumulated sick leave with pay credits and has completed specified service requirements on or before December 5, 1978, shall be reimbursed for all or some of the accumulated unused sick leave with pay credits (“vested sick leave”) on the effective date of retirement for service or disability, the date of death or the date of separation caused by an industrial accident.

69. CSC Rule 320.16.2 provides that reimbursement for vested sick leave “is to be computed at the base rate of pay of an employee’s permanent class, at the base rate of pay of the class of a temporary or provisional employee with no permanent status, or at the base rate of pay in a temporary or provisional appointment of an employee with permanent status in another class who has held such temporary or provisional appointment continuously for one or more years at the time of separation.”

70. It is Defendants’ regular practice to include Training and Education Achievement Pay, Retention Pay and Terrorism Response Training Pay, as appropriate, in wages paid to active employees of the SFFD who take sick leave.

71. Plaintiffs and Class Members each received a lump sum payment purporting to be for vested sick leave that remained unused at the date of their separation from employment. However, this payment for accrued unused vested sick leave did not include Training and Education Achievement Pay, Retention Pay or Terrorism Response Training Pay.

72. Because Training and Education Achievement Pay, Retention Pay and Terrorism Response Training Pay are part of the employees’ salary, Defendants’ failure to include Training and Education Achievement Pay, Retention Pay and Terrorism Response Training Pay in the payment for

1 accrued unused vested sick leave constitutes a violation of CSC Rule 320.16.

2 73. Defendants have a mandatory and ministerial duty to comply with CSC Rule 320.16
3 by reimbursing former employees for accrued unused vested sick leave at their base rate of pay.

4 74. Plaintiffs and Class Members will suffer an irreparable loss of wages if Defendants do
5 not properly calculate and pay their accrued unused vested sick leave.

6 75. Plaintiffs and Class Members have a clear, present and beneficial right to Defendants'
7 compliance with CSC Rule 320.16.

8 76. Plaintiffs and Class Members have no other plain, speedy and adequate remedy in the
9 ordinary course of law other than the relief sought in this petition.

10 77. An actual controversy now exists between the Plaintiffs and Class Members, on the one
11 hand, and the Defendants, on the other, concerning their respective rights and duties. Plaintiffs
12 contend that CSC Rule 320.16 requires the Defendants to include Training and Education
13 Achievement Pay, Retention Pay and Terrorism Response Training Pay in all payments for unused
14 vested sick leave for all former employees who are eligible for such pay, while Defendants disagree.

15 78. Plaintiffs and Class Members seek a judicial determination and declaration that
16 Defendants' refusal to include Training and Education Achievement Pay, Retention Pay and Terrorism
17 Response Training Pay in all payments for unused vested sick leave for all former employees who are
18 eligible for such pay violates CSC Rule 320.16.

19 **XI. PRAYER FOR RELIEF**

20 WHEREFORE, Plaintiffs, on behalf of themselves, the Class Members they seek to represent,
21 and all employees similarly situated who join in this action, request the following relief:

22 1. AS TO THE FIRST CAUSE OF ACTION (Violation of Fair Labor Standards Act)

23 a. Authorization to issue notice at the earliest possible time to all former
24 employees of the San Francisco Fire Department who separated from employment on or after July 1,
25 2001, informing them that this action has been filed, of the nature of the action, and of their right to
26 opt in to this lawsuit if they received a payment during the Liability Period, for unused compensatory
27 time in lieu of overtime that did not include Training and Education Achievement Pay, Retention Pay
28 and/or Terrorism Response Training Pay for which they were eligible;

b. A declaratory judgment that Defendants have violated the overtime provisions of the FLSA, 29 U.S.C. § 207, as to the Plaintiffs and persons similarly situated who opt in to this action by failing to include Training and Education Achievement Pay, Retention Pay and Terrorism Response Training Pay in payments for unused compensatory time in lieu of overtime;

c. A declaratory judgment that Defendants' violations of the FLSA were willful;

d. An order for a complete and accurate accounting of all the unpaid compensatory time to which each Plaintiff and others similarly situated is entitled;

e. An award to Plaintiffs and others similarly situated who opt in to this action of damages in the amount of unpaid compensatory time in lieu of overtime, subject to proof;

f. An award to Plaintiffs and others similarly situated who opt in to this action of liquidated damages in an amount equal to the compensatory time shown to be owed, pursuant to 29 U.S.C. § 216(b); if liquidated damages are not awarded, then in the alternative, prejudgment interest; and

g. An award to Plaintiffs and others similarly situated who opt in to this action of reasonable attorneys' fees and costs, pursuant to 29 U.S.C. § 216(b).

2. AS TO THE SECOND CAUSE OF ACTION (Violation of California Labor Code §227.3)

a. A determination that this action may be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure and notice to the Class Members;

b. A declaratory judgment that Defendants have violated California Labor Code § 227.3 as to the Plaintiffs and the Class by failing to include Training and Education Achievement Pay, Retention Pay and Terrorism Response Training Pay in payments for accrued unused vacation time;

c. An order requiring Defendants to provide a complete and accurate accounting of all the accrued unpaid vacation time to which each Plaintiff and Class Member is entitled;

d. A peremptory writ of mandate ordering Defendants to comply with California Labor Code § 227.3 and to pay each eligible Plaintiff and Class Member for accrued vacation time at the rate that includes Training and Education Achievement Pay, Retention Pay and Terrorism

1 Response Training Pay, plus interest; and

2 e. Judgment in accordance herewith.

3 3. AS TO THE THIRD CAUSE OF ACTION (Violation of San Francisco Civil Service
4 Commission Rule 320.16)

5 a. A determination that this action may be maintained as a class action under Rule
6 23 of the Federal Rules of Civil Procedure and notice to the Class Members;

7 b. A declaratory judgment that Defendants have violated San Francisco Civil
8 Service Commission Rule 320.16 as to the Plaintiffs and the Class by failing to include Training and
9 Education Achievement Pay, Retention Pay and Terrorism Response Training Pay in payments for
10 accrued vested sick leave;

11 c. An Order requiring Defendants to provide a complete and accurate accounting
12 of all the accrued vested sick leave to which each Plaintiff and Class Member is entitled;

13 d. A peremptory writ of mandate ordering Defendants to comply with Civil
14 Service Commission Rule 320.16 and to pay each eligible Plaintiff and Class Member for accrued
15 vested sick leave at the rate that includes Training and Education Achievement Pay, Retention Pay and
16 Terrorism Response Training Pay, plus interest; and

17 e. Judgment in accordance herewith.

18 4. AS TO ALL CAUSES OF ACTION

19 a. An order that Defendants include Training and Education Achievement Pay,
20 Retention Pay and Terrorism Response Training Pay, as appropriate, in all future lump sum payments
21 for accrued compensatory time in lieu of overtime, vacation time and vested sick leave;

22 b. An award to Plaintiffs of reasonable attorneys' fees and the costs of suit
23 incurred herein; and

24 c. An award of such other and further relief as this Court deems just and proper.

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XII. DEMAND FOR JURY TRIAL

Plaintiffs, Class Members and Collective Action Members hereby demand a jury trial on all causes of action and claims with respect to which they have a right to trial by jury.

McCARTHY, JOHNSON & MILLER
LAW CORPORATION

Dated: April 4, 2005

By: /s/ Diane Sidd-Champion
DIANE SIDD-CHAMPION
Attorneys for Plaintiffs